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Generous, Not Just: What Feeds the River of Tribal Despair and Poverty

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GENEROUS, NOT JUST: WHAT FEEDS THE RIVER OF TRIBAL DESPAIR AND POVERTY

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I. INTRODUCTION: ECONOMIC WOES AMONGST THE INDIGENOUS PEOPLES OF NORTH AMERICA

"I think the American people are disposed often to be generous rather than just."

—Fredrick Douglass¹

For the year 2013, the Bureau of Indian Affairs—an agency tasked with “promot[ing] economic opportunity,” managing trust assets, and “enhanc[ing] the quality of life” amongst American Indians—requested \$2.6 billion.² This money provides assistance to Native American Indian tribes for aspects of reservation life ranging from supporting tribal universities to promoting efficiency amongst tribal governments.³ In addition to these programs, tribe members living on reservations also receive federal assistance for education, healthcare, and housing.⁴

Yet in spite of extensive government assistance programs, the conditions on Indian reservations border on squalor, with one New York Times columnist describing them as “Poverty’s Poster Child.”⁵ For example, on the Pine Ridge reservation—one of the poorest places in America—the unemployment rate exceeds eighty percent.⁶ In Shannon County, part of the Pine Ridge reservation, the per capita income averages less than \$9,000 per year, and over half of the population lives in poverty.⁷ The effects of these disastrous economic conditions help drive the high rates of suicide, infant mortality, deaths due to diabetes and heart disease, and substance abuse commonplace on Indian reservations.⁸

The familiar narratives invoked to explain these conditions usually focus on the continuing effect of the historical injustices perpetrated against American Indians.⁹ While the

1. Fredrick Douglass, *What the Black Man Wants*, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society at Boston (1865), available at <http://teachingamericanhistory.org/library/document/what-the-black-man-wants/>.

2. INDIAN AFFAIRS, DEP’T OF THE INTERIOR, BUREAU HIGHLIGHTS 79 (2013), available at <http://www.doi.gov/budget/appropriations/2013/highlights/upload/BH079.pdf> [hereinafter INDIAN AFFAIRS]; BUREAU OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, BUDGET JUSTIFICATION AND PERFORMANCE INFORMATION FISCAL YEAR 2013 IA-OVW-1 (2013), available at <http://www.bia.gov/cs/groups/public/documents/text/idc016442.pdf>.

3. INDIAN AFFAIRS, *supra* note 2, at 79-80.

4. See BUREAU OF INDIAN EDUCATION (last updated Oct. 30, 2013), <http://www.bie.edu/>; INDIAN HEALTH SERVICE, <http://www.ihs.gov/> (last visited Nov. 3, 2013); Office of Native American Programs, *Indian Housing*, DEP’T OF HOUS. AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih (last visited Nov. 3, 2013).

5. Nicholas D. Kristof, *Poverty’s Poster Child*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/opinion/kristof-povertys-poster-child.html?_r=0; Annie Lowrey, *Pain on the Reservation*, N.Y. TIMES (July 12, 2013), <http://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html>.

6. Lowrey, *supra* note 5.

7. *Id.*; United States Census Bureau, *Shannon County QuickFacts from the US Census Bureau*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/46/46113.html>; SHANNON COUNTY, SOUTH DAKOTA, <http://shannon.sdcounties.org/> (last visited Nov. 1, 2013).

8. Office of Minority Health, *American Indian/Alaska Native Profile*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (last modified Sept. 17, 2012), <http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=52>.

9. Aaron Huey, TEDxDU: *America’s Native Prisoners of War* (uploaded 2010), available at http://www.ted.com/talks/aaron_huey.html. Commentators frequently blame the economic plight of modern

detrimental effects of the federal government's policies are undeniable, a new narrative is emerging in the quest to discover the headwaters which feed the river of tribal poverty and despair.¹⁰ Economists and tribal leaders now recognize a new causal factor: a lack of workable private property rights, which increases transactional costs and stifles reservation economies.¹¹

The problem of poverty on reservations extends beyond the borders of the United States and afflicts the indigenous populations of Canada, known as the First Nations.¹² Fifty percent of status First Nations children live below the poverty line.¹³ Unemployment rates on reservations average ten percent higher than for members of the same racial groups who live off the reservations.¹⁴ Poverty amongst First Nations currently costs Canadians \$4 billion a year.¹⁵

But there are new voices in Canada today that demand change and offer First Nations hope of escape from poverty.¹⁶ One such voice, Manny Jules—former band chief of the Kamloops and chairman of the Indian Nations Tax Commission—spearheaded the latest push for increased property rights and tribal sovereignty through the First Nations Property Ownership Initiative (“FNPO”).¹⁷ If the FNPO passes, First Nations could exercise increased sovereignty over their land and reduce transactional costs by ending their trust relationship with the Crown, and First Nations could grant fee simple title to band members with reversionary title held by the band.¹⁸ The FNPO would increase prosperity on reservations through reducing transactional costs and enhancing access to capital in a culturally appropriate manner, and Congress should implement a similar system for communally held lands on reservations in the United States.

This article begins with Part II tracing the philosophical origins of governmental policies that dealt with indigenous peoples in North America.¹⁹ Part III tracks the progress

American Indians on the forcible removal of their ancestors from their traditional homelands and the subsequent attempts at assimilation. *Id.*

10. John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES.COM (Dec. 13, 2011), <http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/>; see HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

11. See Koppisch, *supra* note 10; Kristof, *supra* note 5 (“A second [factor] is that reservations are often structured in ways that discourage private investment.”); TOM FLANAGAN ET AL., *BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS* (2010).

12. FLANAGAN ET AL., *supra* note 11, at 136; *Muslims Gather Food for First Nations*, WINNIPEG FREE PRESS, Nov. 26, 2013, at D12.

13. DAVID MACDONALD & DANIEL WILSON, CAN. CTR. FOR POLICY ALTS., *POVERTY OR PROSPERITY: INDIGENOUS CHILDREN IN CANADA* 6 (2013), available at http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2013/06/Poverty_or_Prosperty_Indigenous_Children.pdf.

14. CAN. STATISTICS, TBL. 7 EMPLOYMENT AND UNEMPLOYMENT RATES FOR THE FIRST NATIONS IDENTITY POPULATION AND THE REGISTERED INDIAN POPULATION (AGED 25 TO 54) LIVING ON AND OFF RESERVE, CANADA, 2001 AND 2006 (2009), available at <https://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-559/table/t7-eng.cfm>.

15. FLANAGAN ET AL., *supra* note 11, at 136.

16. See generally FLANAGAN ET AL., *supra* note 11.

17. *Biography—Mr. C.T. (Manny) Jules*, ABORIGINAL AFFAIRS AND NORTHERN DEV. CAN., <http://www.aadnc-aandc.gc.ca/eng/1100100015525/1100100015526> (last modified Sept. 15, 2010); First Nations Tax Comm’n, FIRST NATIONS PROPERTY OWNERSHIP INITIATIVE, <http://fnpo.ca/Home.aspx> (last visited Nov. 3, 2013).

18. First Nations Tax Comm’n, *Proposal*, FIRST NATIONS PROPERTY OWNERSHIP INITIATIVE, <http://fnpo.ca/Proposal.aspx> (last visited Nov. 3, 2013).

19. See *infra* Part II.

of modern aboriginal property rights in Canada, and Part IV explores the history of tribal property rights in the United States.²⁰ Part V introduces the proposed next step to increase economic health and sovereignty amongst First Nations: the First Nations Property Ownership Initiative.²¹ Part VI addresses how the United States' adoption of a policy similar to the FNPO would affect American Indians living on reservations.²²

II. POLITICAL PHILOSOPHY AND ITS EFFECT ON THE INTERACTION WITH ABORIGINAL POPULATIONS IN NORTH AMERICA

A. *The Whig and Tory Traditions*

In order to properly understand the present day regulatory structure afflicting the indigenous peoples of North America, one must understand the philosophical basis of that system.²³ The cultural divide which defined the original English settlers—the conflict between the Whig and Tory political traditions—also defines the modern system of regulation affecting the indigenous peoples of North America.²⁴ The Whig tradition emphasized “individualism, Protestantism, representative government, and free trade.”²⁵ Followers of the Whig tradition believed themselves to be the recipients of a folkright which traced its genealogy to the social and political structure of Anglo-Saxon England before the Norman invasion in 1066.²⁶ This folkright entitled them to personal autonomy, representative government as symbolized by the parliamentary system, and a law which was not merely “a projection of the wishes of the ruler,” but which “bound the King just as surely as it bound his meanest subject.”²⁷

In contrast, the Tory tradition sought to achieve societal stability through support for strong, centralized leadership.²⁸ Tracing its roots back to the Cavaliers who fought for the monarchy during the English Civil War, Toryism adhered to the principles of “monarchy, aristocracy, episcopacy, hierarchy, loyalty, and land.”²⁹ Tory social and economic policies demonstrated a strong focus on “[m]aintaining law and order and the institution of the British Crown.”³⁰ This included supporting “conservative and anti-revolutionary” values, while still expressing “opposition to laissez-faire economics.”³¹

Though the English colonies in North America contained a significant population of

20. *See infra* Parts III–IV.

21. *See infra* Part V.

22. *See infra* Part VI.

23. DANIEL HANNAN, *INVENTING FREEDOM: HOW THE ENGLISH-SPEAKING PEOPLES MADE THE MODERN WORLD* (2013).

24. *Id.* at 15–16.

25. *Id.* at 168–69.

26. *Id.* at 15.

27. *Id.* at 63.

28. *Id.* at 212. During both the English Civil War (which Hannan describes as the First Anglosphere Civil War) and the American Revolutionary War (described as the Second Anglosphere Civil War) Tory sympathy rested with the Crown. In contrast, Whig sympathy rested with parliament during the First Anglosphere Civil War and with truly representative, local parliamentary government during the Second Anglosphere Civil War. *See id.* at 168–69, 223, 225.

29. *Id.* at 168–69, 225.

30. PHILIP MASSOLIN, *CANADIAN INTELLECTUALS, THE TORY TRADITION, AND THE CHALLENGE OF MODERNITY, 1939–1970* 8 (2001).

31. *Id.*

those who held to the essentially pseudo-libertarian Whig tradition in domestic affairs, colonists' dealings with indigenous peoples fell deeply within the Tory tradition of centralized, unilateral control.³² The revolutionary principles that constituted the first green buds of a sustained libertarian tradition in domestic dealings did not extend to foreign affairs, defense, and trade.³³ Additionally, in the mind of both philosophers and settlers, indigenous peoples who were different in culture, language, and blood lay far "beyond the circle of reciprocity" within which they recognized obligations.³⁴

Today, tribes are openly challenging the ruling Tory paradigm in which the power to govern flows not from individual to individual through contract nor from the people to the government, but emanates from the sovereign who then makes decisions on behalf of the people.³⁵ Native American and First Nations entrepreneurs and tribal leaders are rejecting a strong central authority—even a seemingly benevolent one—in favor of the essentially Whig principles of personal autonomy, representative government through widely dispersed power, and personal property rights.³⁶ Still, the vast majority of the dialogue regarding issues affecting tribes rests on the idea of a centrally planned economy: explicitly disparaging instances of incompetence or avarice, while implicitly attesting to the virtue of the plan itself.³⁷

B. *The Historical Effect of Toryism on Interactions with Native Peoples*

On October 7, 1763, King George III issued a document that crystallized the British policy of centralized control of interactions with the indigenous populations in North America: the Royal Proclamation of 1763.³⁸ Released following the Treaty of Paris in

32. HANNAN, *supra* note 23, at 211–12; FLANAGAN ET AL., *supra* note 11, at 57–58; In addressing paradoxical behaviors (such as maintaining a foreign and domestic policy which are diametrically opposed on principle), Malcolm Gladwell argues that people do not attempt to reconcile them as much as they use the instances of virtuous behavior to legitimize instances of morally wrong behavior. Malcolm Gladwell, Talk at The New Yorker Festival: Tokens, Pariahs, and Pioneers (Oct. 6, 2013), available at <http://www.newyorker.com/video?video-id=2724681165001>.

33. HANNAN, *supra* note 23, at 214 ("Even the most radical Patriots accepted . . . that the wider British imperium of which they formed a part should be in charge of foreign policy and defense, and most also accepted that such sovereignty implied control over external trade . . .").

34. *Id.* at 282–83.

35. Scugog Island First Nation Land Management Code, s. 4.1 (1997), available at <http://labrc.com/wp-content/uploads/2014/03/Mississaugas-of-Scugog-Island-Land-Code.pdf> ("The power of Scugog Island First Nation to govern and administer our lands flows from the Creator to the people of Scugog Island First Nation, and from the people to their Council.").

36. MANNY JULES, *Foreward* to TOM FLANAGAN ET AL., BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS x (2010).

We became the poorest of the poor because after contact the governments of Canada and the United States passed legislation that removed us from the economy . . . The path I chose was to legislate our way back into the economy and build institutions that implement our collective rights and release our individual creative energy.

Id.; CanupawakpaDakota, *Children of the Plains*, YOUTUBE (uploaded 2011), <https://www.youtube.com/watch?v=GACcBe9Be58> ("Business ownership is new for us. We've had the government hand us food, hand us this, hand us the necessities . . . [we are] a society that was made dependent.").

37. Lowrey, *supra* note 5 ("More people sick; fewer people educated; fewer people getting general assistance; more domestic violence; more alcoholism," said Richard L. Zephier, the executive director of the Oglala Sioux tribe. "That's all correlated to the cuts from sequestration."); ThomasPaine4, John Stossel-03/25/11-C, YOUTUBE (uploaded 2011) ("I think the government should be giving the Indian people more appropriations so that we can exist out here."), <https://www.youtube.com/watch?v=icS5eLWYv0w>; see generally FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944).

38. ROYAL PROCLAMATION OF 1763, available at <http://www.ushistory.org/declaration/related/proc63.htm>.

1763, the Royal Proclamation enunciated the official position of the British government with regard to indigenous populations living in North America and the land they held.³⁹ The Royal Proclamation reserved all lands not already controlled by the governments established by the Crown or granted to the Hudson's Bay Company for use by the Indians.⁴⁰ The Crown declared that these reserved lands would remain under its "Sovereignty, Protection, and Dominion."⁴¹ In addition to reserving those lands for future use by the Indians, the Royal Proclamation also required that all British citizens who had settled there remove themselves.⁴²

The Royal Proclamation of 1763 did not stop at recognizing the rights of the Indians to use the land newly governed by the Crown and ordering settlers to vacate non-British held lands; it "strictly forbid, on Pain of our Displeasure," the private purchase of Indian land by settlers.⁴³ Citing the need to stop "great Frauds and Abuses" perpetrated by settlers seeking to purchase Indian land, the Royal Proclamation announced that the Crown would hold a monopoly on the future purchase of any Indian land.⁴⁴ The Crown declared this circumscription of the rights of the individual necessary in order to prevent fraud, remove ill will amongst the Indians which might lead to violence, "and to the end that the Indians may be convinced of our Justice."⁴⁵

Prior to the Royal Proclamation of 1763, the British and colonial governments negotiated and entered into treaties with tribes of sovereign nations.⁴⁶ Yet the Crown's position in drafting the Royal Proclamation went beyond simply enforcing fairness when entering into land dealings with the sovereign Indian tribes for the parties' mutual benefit.⁴⁷ It assumed control of the right to acquire or alienate land under the cloak of protectionism and benevolence.⁴⁸ While the short-term motivation for the regulation or interdiction of commercial intercourse between the settlers and Indian bands was ostensibly a reaction to instances of violence provoked by fraud, the practical implications of the proclamation was the establishment of a faulty monopoly.⁴⁹

The "old and recurrent fantasy,"⁵⁰ that before contact with Europeans native populations were absolute strangers to the tripartite Whig principle of personal autonomy, representative government, and especially private property rights, gave birth to the core principles which underlie the Royal Proclamation and its progeny legislation.⁵¹ These

39. John F. Leslie, *The Indian Act: An Historical Perspective*, 25 CAN. PARLIAMENTARY REV. 23 (2002), available at <http://www.revparl.ca/english/archives.asp>.

40. ROYAL PROCLAMATION OF 1763, ¶ 14.

41. *Id.*

42. *Id.* ¶ 16.

43. *Id.* ¶ 15.

44. *Id.* ¶ 17 (A representative of the Crown could purchase land from the Indians "only for Us [the Crown], in our Name.").

45. *Id.*

46. Janique Dubois & Kelly Saunders, "Just Do It!": Carving Out a Space for the Métis in Canadian Federalism, 46 CAN. J. OF POLITICAL SCI. 188–89 (2013).

47. *Id.* at 188.

48. Leslie, *supra* note 39, at 23.

49. ROYAL PROCLAMATION OF 1763, ¶ 17; FLANAGAN ET AL., *supra* note 11, at 57–59.

50. FLANAGAN ET AL., *supra* note 11, at 30.

51. *Id.* at 30–31; see also Craig S. Galbraith et al., *False Myths and Indigenous Entrepreneurial Strategies*, 19 J. OF SMALL BUS. & ENTREPRENEURSHIP 1 (2006).

presumptions rationalized the conclusion that only a strong, benevolent central power mediating interactions between the tribes and the colonists could achieve justice and understanding between the parties and justified the “expropriation [of land] with little or no compensation.”⁵² However, today, as the understanding of First Nations and Native American history increases, voices for political and economic reform assert that indigenous populations utilized open, market-based economies, with different forms of private property rights pre-colonization.⁵³

While the indigenous populations did not have a single set of *standardized* property rights pre-contact, tribes across North America maximized the usefulness of their available resources through the customized property rights they practiced and the market-based economies they maintained.⁵⁴ The First Nations of Canada engaged in extensive trade between different bands and created roads, currencies, written records of transactions, and settled on a common trade language.⁵⁵ Tribes living on the west coast asserted ownership over certain streams in which salmon would spawn, and they practiced husbandry of those streams.⁵⁶ In areas where trapping was an important economic activity, families asserted ownership rights to prime locations.⁵⁷ In pre-colonial California, Native American farming tribes allowed tribe members to own property privately under a homesteading system.⁵⁸ Once a tribe member gained ownership of the land, the tribe member could “protect[] [the land] against trespassers and squatters; it could also be sold, leased, and inherited.”⁵⁹

Even though the differences in the conditions in which private property rights emerged created differences in the property rights practiced by indigenous peoples and European settlers, First Nations and Native American tribes certainly had a conception of private property which would likely have allowed an evolution in land transactions to progress towards a satisfactory end.⁶⁰ Instead, the establishment of the Crown’s monopoly took one of the most divisive issues of the eighteenth and nineteenth century—the alienation and acquisition of land in North America—out of the hands of those who would have had the greatest incentive to achieve an outcome with a peaceful and satisfactory end: the “private Person.”⁶¹ Instead, a remote power—the Crown and its representatives—took direct control of the outcome, though distance largely insulated the Crown from the direct effect of the policies it enacted.⁶² This policy of order through edicts and centralization

52. ROYAL PROCLAMATION OF 1763, ¶ 17; FLANAGAN ET AL., *supra* note 11, at 31.

53. JULES, *supra* note 36, at xii.

Throughout our history we have had the ability to choose successful innovations and reject poor ones. Our most successful innovators were the Maya, Aztecs, and Incas, but each of our cultures built on our competitive advantage and created sustainable economies. After contact, a system of central planning was imposed on us.

Id.; see also TERRY ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS?: AN ECONOMIC HISTORY OF AMERICAN INDIANS (1995).

54. Galbraith et al., *supra* note 51, at 4.

55. JULES, *supra* note 36, at ix.

56. FLANAGAN ET AL., *supra* note 11, at 34–36; Galbraith et al., *supra* note 51, at 4.

57. Galbraith et al., *supra* note 51, at 4–5.

58. *Id.* at 4.

59. *Id.*

60. FLANAGAN ET AL., *supra* note 11, at 30–41.

61. ROYAL PROCLAMATION OF 1763, ¶ 17.

62. *Id.*

had a devastating effect on the economic plight of the indigenous peoples of North America through its philosophical progeny: the Indian Act in Canada and the Dawes Act in the United States.⁶³

III. THE HISTORY OF PROPERTY RIGHTS AMONGST THE INDIGENOUS PEOPLES OF CANADA

A. *The Indian Act: Early Incarnations of Property Rights*

Passed in 1876, the Indian Act governed the modern relationship between the Canadian government and the First Nations bands in Canada.⁶⁴ The same attitude of protectionism and patronization that infected earlier interactions with First Nations became a cornerstone of the Indian Act.⁶⁵ The Indian Act regulated nearly every aspect of the lives of the members of First Nations, from who the Canadian Government considered an Indian to the maintenance of roads and bridges on reservations to how the tribes could conduct trade.⁶⁶ The Indian Act also gave the Indian Affairs department great power to insert its discretion into the day-to-day activities of First Nations bands.⁶⁷ For instance, under the Indian Act a member of certain First Nations bands could not so much as give a potato to someone who was not a member of his or her band without the written permission of the superintendent.⁶⁸

The Indian Act of 1876 also established the property rights of members of First Nations bands.⁶⁹ The question of First Nations property rights in general is intimately linked with both the text of the Indian Act and its inception against a backdrop of discontent and threatened violence related to land allotments and compensation.⁷⁰ On the cusp of deciding the scope of First Nations property rights, the government of Canada decided the real question that would determine the government's dealing with the First Nations for generations to come: whether the government would treat Indians 'as minors or as white men.'⁷¹ In 1873, a memorandum from the Deputy Superintendent-General confirmed the government's position that "the legal status of the Indians of Canada is that of minors, with the Government as their guardians."⁷²

Under the Indian Act of 1876, the government provided for the first in a series of incarnations of quasi-property rights—the location ticket.⁷³ A location ticket entitled its

63. Indian Act, R.S.C. 1985, c. I-5 (last amended Apr. 1, 2013); An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act or Dawes Act), 24 Stat. 388 (1887), available at <http://public.csusm.edu/nadp/a1887.htm> [hereinafter Dawes Act].

64. KEN COATES, *THE INDIAN ACT AND THE FUTURE OF ABORIGINAL GOVERNANCE IN CANADA* 1 (2008).

65. *Id.* at 2 ("Its basic premises, summarized as providing for 'civilization, protection and assimilation,' were that the Government of Canada viewed Aboriginal people as wards, that Indigenous communities and governments were incapable of managing their affairs . . .").

66. Indian Act, R.S.C. 1985, c. I-5, s. 5-6, 34, 91-92.

67. COATES, *supra* note 64, at 2.

68. Indian Act, R.S.C. 1985, c. I-5, s. 32(1).

69. FLANAGAN ET AL., *supra* note 11, at 66.

70. KAHN-TINETA MILLER ET AL., *THE HISTORICAL DEVELOPMENT OF THE INDIAN ACT* 58 (1978).

71. *Id.* at 60.

72. *Id.* (internal quotation omitted) (alteration in original).

73. FLANAGAN ET AL., *supra* note 11, at 66; MILLER ET AL., *supra* note 70, at 62.

possessor to a sort of enhanced life estate on a plot of land located within the band's allotted reserve land.⁷⁴ Even after a tribe member received a location ticket, the tribe member could not freely alienate his land since the Indian Act did not permit legal seizure of the land, transfer of the land to someone outside the band, or transfer of the land to someone within the band without the band's approval.⁷⁵ The only way for a member of a recognized First Nations band to gain true fee simple title to the land was through enfranchisement.⁷⁶ Enfranchisement refers to the process by which an Indian who the Crown "judged to be of good moral character, free of debt, and could read and write English" could voluntarily revoke his status as an Indian under the Gradual Civilization Act of 1857.⁷⁷

This policy, which prohibited the alienation of First Nations land and vested ultimate title not in the band but in the Crown, had disastrous economic consequences for First Nations tribes partly because it prevented them from leveraging their land in order to obtain capital.⁷⁸ Manny Jules, former chief of the Kamloops, describes the policy as creating "a 100-year credit crisis from which [First Nations] have yet to recover."⁷⁹ Because of this credit crisis, First Nations entrepreneurs could not draw upon the value of the 6.5 million acres of land in Canadian reserves, which crippled their attempts to open businesses.⁸⁰ Reservations desperately needed these businesses to create an upwardly mobile society; yet, as Manny Jules explained, "A lot of small businesses never get started because people can't leverage property [to raise funds]".⁸¹

Location tickets or fee simple title gained through enfranchisement were the only property ownership options available to most First Nations bands for the next seventy-five years.⁸² In 1951, an amendment to the Indian Act introduced the next step toward true property rights for First Nations bands—the certificate of possession.⁸³ Certificates of possession were an improvement over location tickets because they provided stronger statutory property rights as well as more secure tenure.⁸⁴ Yet these certificates of possession fell dramatically short of full property rights as they were transferrable only within the band and creditors could not legally seize the land, which made it more difficult to borrow against its value.⁸⁵ In addition, transactions required approval from the minister of Indian Affairs.⁸⁶ Though the intention of the amendment was to introduce the certificate of possession as a stopgap measure between the location ticket and the time the Canadian gov-

74. FLANAGAN ET AL., *supra* note 11, at 67.

75. *Id.*

76. *Id.* at 63–64, 67.

77. *Id.* at 63–64.

78. *Id.* at 4 ("Lack of collateral is indeed a well-known and serious obstacle to aboriginal business ventures . . .").

79. JULES, *supra* note 36, at x.

80. FLANAGAN ET AL., *supra* note 11, at 3.

81. Koppisch, *supra* note 10 ("When you don't have individual property rights, you can't build, you can't be bonded, you can't pass on wealth. A lot of small businesses never get started because people can't leverage property [to raise funds].").

82. FLANAGAN ET AL., *supra* note 11, at 67.

83. Indian Act, R.S.C. 1985, c. 1-5, s. 20(2)–(3); FLANAGAN ET AL., *supra* note 11, at 68.

84. FLANAGAN ET AL., *supra* note 11, at 68.

85. *Id.* at 68–69.

86. *Id.* at 68.

ernment granted full fee simple title to members of First Nations tribes, the Canadian government never granted fee simple title to all First Nations, and the certificate of possession remains in use today.⁸⁷

B. *White Paper of 1969*

In 1969, the Canadian government released a policy statement proposing a new solution to the continuing difficulties experienced by First Nations.⁸⁸ This policy paper entitled “Statement of the Government of Canada on Indian Policy” was known as the White Paper of 1969 (“White Paper”).⁸⁹ Though the stated intent of the paper was to create policies that would “lead to the full, free and nondiscriminatory participation of the Indian people in Canadian society,”⁹⁰ the First Nations community intensely criticized the proposals.⁹¹

The White Paper recognized the challenges that members of First Nations faced in housing, employment, and education, and it placed the blame for this poor state of affairs squarely on the separate legal status the Canadian government imposed on Indians.⁹² In the White Paper, the Canadian government announced its intention to break with the persistent patterns of piecemeal reform and welfare initiatives that the drafters of the paper felt would ultimately prove to be insufficient.⁹³ Instead, the Canadian government would initiate whole scale legislative reform focused on equalizing the legal status of Indian and non-Indian citizens.⁹⁴ This new policy would create “[t]rue equality,” by ensuring “that the Indian people have the right to full and equal participation in the cultural, social, economic and political life of Canada.”⁹⁵ To advance this end, the report laid out six propositions that would provide guidance to the Canadian government in its future dealings with First Nations.⁹⁶ It also enumerated four concrete steps that the Canadian government was prepared to take to implement these policies.⁹⁷

87. *Id.* at 68–69.

88. Univ. B.C., *The White Paper 1969*, INDIGENOUS FOUNDATIONS (2009), <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-white-paper-1969.html>.

89. JEAN CHRÉTIEN, MINISTRY OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (1969), available at <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191>. The term “white paper” generally refers to an official report which illuminates government policy on an issue. Library of Parliament, *White Papers*, PARLIAMENT OF CANADA (last updated Dec. 6, 2009), <http://www.parl.gc.ca/parlinfo/pages/WhitePapers.aspx>.

90. CHRÉTIEN, *supra* note 89, at 3.

91. See Indian Chiefs of Alberta, *Citizen Plus*, 1 ABORIGINAL POL’Y STUD. 188, 188 (2011), available at <http://ejournals.library.uAlberta.ca/index.php/aps/article/view/11690/8926>.

92. CHRÉTIEN, *supra* note 89, at 2, 4.

93. *Id.* at 6.

94. *Id.*

95. *Id.* at 7.

96. *Id.* These six principles are:

(1) that the legislative and constitutional bases of discrimination be removed; (2) that there be positive recognition by everyone of the unique contribution of Indian culture to Canadian life; (3) that services come through the same channels and from the same government agencies for all Canadians; (4) that those who are furthest behind be helped most; and (5) that lawful obligations be recognized; (6) that control of Indian lands be transferred to the Indian people. *Id.*

97. *Id.* at 7–8; These four steps are:

(1) Propose to Parliament that the Indian Act be repealed and take such legislative steps as may be necessary to enable Indians to control Indian lands and to acquire title to them; (2) Propose to the governments of the provinces that they take over the same responsibility for Indians that they have for other citizens in their provinces. The

The sixth principle set out in the White Paper was “that control of Indian lands be transferred to the Indian people.”⁹⁸ The concrete steps the White Paper proposed as a way to bring this principle to fruition were that Parliament should repeal the Indian Act and “take such legislative steps as may be necessary to enable Indians to control Indian lands and to acquire title to them.”⁹⁹ The drafter of the White Paper saw the trust system as the chief evil affecting reserve lands.¹⁰⁰ The “delays . . . frustrations and . . . obstructions” that mired an individual initiative would continue as long as the government of Canada had final say over the management and alienation of Indian lands and as long as each decision required ministerial approval.¹⁰¹

Even though the express purposes of the White Paper, such as creating an “environment of legal, social and economic equality,” were laudable, the White Paper drew harsh criticism from the First Nations community.¹⁰² One especially critical refutation was “Citizens Plus,” a direct response to the White Paper by a group known as the Indian Chiefs of Alberta (“Chiefs”).¹⁰³ Though the paper took rhetorical aim at nearly all aspects of the White Paper, the criticism of the plan to increase Indian control over reserve land was especially harsh.¹⁰⁴ In the opening paragraph of the preamble, the Chiefs voiced a premonition that if the government followed through with its plan to increase Indian control over reserve land, it would not be long before “our people would be left with no land” and “the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos.”¹⁰⁵

The two stated reasons for the Chiefs’ opposition to proposition six were the potential loss of the land and the introduction of taxation; yet, their opposition, on the whole, seemed compelled by a reflexive mistrust of completely private control of resources.¹⁰⁶ The Chiefs advocated viewing reserve lands as strictly *tribal* land and not as *Indian* land, for the Crown did not reserve the land for individual Indians and the Chiefs were “opposed to any system of allotment that would give individuals ownership with rights to sell.”¹⁰⁷ The purpose of the land was exclusively for the “common use and benefit of the tribe.”¹⁰⁸

The trust system—which gave First Nations tribes the rights to use and benefit from

take-over would be accompanied by the transfer to the provinces of federal funds normally provided for Indian programs, augmented as may be necessary; (3) Make substantial funds available for Indian economic development as an interim measure; and (4) Wind up that part of the Department of Indian Affairs and Northern Development which deals with Indian Affairs. The residual responsibilities of the Federal Government for programs in the field of Indian affairs would be transferred to other appropriate federal departments. *Id.*

98. *Id.* at 7.

99. *Id.*

100. *Id.* at 21–22.

101. *Id.*

102. *Id.* at 2; see also HAROLD CARDINAL, *THE UNJUST SOCIETY* (1999).

103. Indian Chiefs of Alberta, *supra* note 91, at 188. “Citizens Plus” was popularly referred to as the “Red Paper”—a playoff of the government policy report’s designation as the “White Paper.” Univ. B.C., *supra* note 88.

104. Indian Chiefs of Alberta, *supra* note 91, at 189.

105. *Id.*

106. *Id.* at 189–90; see also *id.* at 197 (“The second error that the Government commits is making the assumption that Indians can have control of the land only if they take ownership in the way that ordinary property is owned.”).

107. *Id.* at 198.

108. *Id.*

the land but allowed the Crown to hold ultimate title to it—was an important tool of enforcement in preventing alienation of tribal land regardless of the wishes of the person living on or using the land.¹⁰⁹ The perceived problems that existed with the trust system were small compared to the prospect that the new Indian owners would rush to alienate their land and “within a generation or shortly after the proposed Indian Lands Act expire[d] [First Nations] would be left with no land.”¹¹⁰ The Indian chiefs of Alberta willingly declared, “We have no king but Caesar”¹¹¹ as they stated “[Indian lands] must be held *forever* in trust of the Crown.”¹¹²

C. *First Nations Land Management Act*

Still dissatisfied with the detrimental effect of the land management scheme contained in the Indian Act, a group of chiefs proposed a new system under which First Nations would draft, implement, and enforce their own land management codes.¹¹³ Thirteen tribes signed onto the Framework Agreement on First Nations Land Management (“Framework Agreement”), which laid out the terms of the agreement through which tribes could escape the land management portion of the Indian Act.¹¹⁴ Four years later, in 1999, the legislature enacted the Framework Agreement through the First Nations Land Management Act (“FNLMA”) with fourteen tribes enrolled as original signatories.¹¹⁵

To opt into the FNLMA, a First Nations band would draft a land code which complied with certain elements laid out in the FNLMA.¹¹⁶ Next, the individual tribe and the Minister of Indian Affairs and Northern Development would have entered into an “individual agreement” addressing the “transfer of administration” from the government to the tribe.¹¹⁷ Finally, a majority of tribe members living on and off reserve who participate in a vote on the measures must approve them.¹¹⁸ Once enacted, these land codes give to First Nations tribes the right to “exercise the powers, rights and privileges of an owner in relation to [First Nations] land.”¹¹⁹ The powers granted to the tribe include the power to grant licenses for the use of the land, the power to control the natural resources present on the land, and the power to “receive and use all moneys” acquired under the land code.¹²⁰ While

109. *Id.* at 197–98.

110. *Id.* at 189.

111. *John* 19:15 (“Pilate saith unto them, Shall I crucify your King? The chief priests answered, We have no king but Caesar.”).

112. Indian Chiefs of Alberta, *supra* note 91, at 198 (emphasis added). The full quote reads: “It must be held forever in trust of the Crown because, as we say, ‘The true owners of the land are not yet born.’” *Id.*

113. FLANAGAN ET AL., *supra* note 11, at 108 (explaining that this group was led by Chief Robert Louie of the West-bank First Nation, Chief Austin Bear of the Muskoday First Nation, and Chief Strater Crowfoot of the Siksika First Nation.).

114. FRAMEWORK AGREEMENT ON FIRST NATIONS LAND MANAGEMENT (1996), available at <http://www.labrc.com/FA.html>; *Framework Agreement on First Nations Land Management*, FIRST NATIONS LAND MANAGEMENT RESOURCE CENTRE INC., <http://www.labrc.com/FA.html> (last visited Dec. 30, 2013).

115. First Nations Land Management Act S.C. 1999, c. 24 (1999) (last amended Dec. 14, 2012), available at <http://laws-lois.justice.gc.ca/eng/acts/F-11.8>; FLANAGAN ET AL., *supra* note 11, at 108–09; FIRST NATIONS LAND MANAGEMENT RESOURCE CENTRE INC., *supra* note 114.

116. S.C. 1999, c. 24, *supra* note 115, at s. 6(1). These elements include such things as general rules for the “use and occupancy of First Nation land” and a specific forum for dispute resolution. *Id.* at s. 6(1)(b) & (i).

117. *Id.* at s. 6(3)(a).

118. *Id.* at s. 10(1)–(2); *Id.* at s. 12(1)–(2); *Id.* at s. 10(2).

119. *Id.* at s. 18(1)(a).

120. *Id.* at s. 18(1)(b)–(d).

it grants to First Nations important land control powers, the FNLMA does not affect the underlying title to the land and does not allow tribe members to sell, exchange, convey, or transfer land outside of the band.¹²¹

The signature element of the FNLMA incorporates the voluntary nature of the process.¹²² From the Royal Proclamation of 1763 onward, a federal sovereign meted out laws and regulations to otherwise unwilling First Nations.¹²³ The FNLMA turned this trend on its head by including in the legislation only tribes with the voluntary consent of the tribe members and by creating a system through which the tribes themselves created and controlled the new land management system.¹²⁴ As of early 2013, thirty-five of the over six hundred First Nations communities in Canada operated under their own land codes, and thirty First Nations were in the process of implementing their own land codes.¹²⁵ Sixty additional First Nations have expressed interest in opting into the FNLMA.¹²⁶ Several First Nations that have implemented their own land codes have already experienced significant benefits after emerging from under the land control portions of the Indian Act.¹²⁷

One such success story is that of the Mississaugas of Scugog Island.¹²⁸ Though they are a small band, the land code they created, which went into effect in 2000, is a model for First Nations land code development.¹²⁹ The defining feature of the land code is the formalization of customary land rights through a registry requirement.¹³⁰ These interests, once registered, entitle the holder to the “exclusive use and occupancy” of the land at issue and, perhaps most significantly, protect the holder from the expropriation of the land by the tribe.¹³¹

The freedoms created under the FNLMA have had concrete economic benefits for the Mississaugas and have laid the groundwork for future economic development.¹³² Transaction costs have significantly decreased because the time it takes to complete a land transaction has decreased from up to two years under the Indian Act to, in some cases, a

121. *Id.* at s. 26(1); FRAMEWORK AGREEMENT ON FIRST NATIONS LAND MANAGEMENT, *supra* note 113, at s. 13.3.

122. FLANAGAN ET AL., *supra* note 11, at 148; *see also id.* at 21.

123. *Id.* at 58 (“Above all, [the Royal Proclamation of 1763] was a unilateral document, issued by King George III after being drawn up by his advisors. There was no attempt at negotiation or even consultation with the natives of North America regarding the property rights which the Proclamation attributed to them.”); *see also id.* at 45.

124. S.C. 1999, c. 24, *supra* note 115, at s. 12(2); *Id.* at s. 6(1); *see* MINISTRY OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, EXPERIENCES IN FIRST NATIONS, INUIT AND NORTHERN COMMUNITIES COMPREHENSIVE COMMUNITY PLANNING 96 (2004), available at <http://publications.gc.ca/collections/Collection/R2-262-2003E.pdf> [hereinafter MINISTRY OF INDIAN AFFAIRS] (“One of the first things we did was for our Chief to consult our Elders. Together, they considered ‘What does land management involve and what will it mean for our First Nation?’”) (internal quotation mark omitted).

125. *First Nations Land Management Act*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (June 19, 2013), <http://www.aadnc-aandc.gc.ca/eng/1317228777116/1317228814521> [hereinafter ABORIGINAL AFFAIRS]; *First Nations People of Canada*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (Apr. 18, 2011), <http://www.aadnc-aandc.gc.ca/eng/1303134042666/1303134337338>.

126. ABORIGINAL AFFAIRS, *supra* note 125.

127. FLANAGAN ET AL., *supra* note 11, at 110–17.

128. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 90–94.

129. FLANAGAN ET AL., *supra* note 11, at 110.

130. Scugog Island First Nation Land Management Code, *supra* note 35, at s. 15.1.

131. *Id.* at s. 16.3, 29.1. The land code also formalizes the procedure for dispute resolution and removes the federal government from the process of land transactions in favor of local tribal control. *Id.* at s. 26; FLANAGAN, *supra* note 11, at 111–12.

132. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 92, 94.

matter of hours under the control of the tribe.¹³³ Because the Mississaugas administer their own land code, creditors view them as a more “stable potential partner,” which has opened up capital for business development.¹³⁴ The capital the Mississaugas have secured has enabled them to create the Great Blue Heron Charitable Casino, which has not only secured full employment for the tribe but also employs around 900 workers from the surrounding areas and other First Nations.¹³⁵

Yet these economic benefits are secondary to the Mississaugas’ final goals—tribal sustainability and self-government.¹³⁶ While controlling the destiny of their land through local governance is merely the first step towards complete self-government, local land management serves as a valuable example of the ability of small tribal units to govern themselves effectively without federal interference.¹³⁷ Due to local business development and the promise of future development stemming from the ability of the tribe to secure capital, the community can now incentivize young people to stay and members who had left the community to return.¹³⁸

Despite the benefits and opportunities the FNLMA has created for First Nations, several serious problems remain that demonstrate the need for continued reform in the areas of land management and land rights.¹³⁹ The most pressing problem affecting the success of tribal land management under the FNLMA is the expected proliferation of divergent land codes.¹⁴⁰ Though the decrease in transaction costs has made development on reserve land more attractive to businesses, the varied nature of the rights and procedures laid out in the land codes themselves cause undue confusion and complication for any company seeking to do business with more than one tribe.¹⁴¹ The absence of a model land code has exacerbated this problem.¹⁴² Also, a general lack of resources has increased the cost of developing land codes and training staff members, as well as generally increasing the amount of time needed to complete the process.¹⁴³

IV. THE HISTORY OF PROPERTY RIGHTS AMONGST THE INDIGENOUS PEOPLE OF THE UNITED STATES

A. *The Lake Mohonk Conference of Friends of the Indians*

In 1883, a group of prestigious religious, legal, military, and political leaders began gathering on the grounds of the Lake Mohonk Mountain House in New York to discuss the plight of Indians in the United States and decide upon a single course of action to

133. FLANAGAN ET AL., *supra* note 11, at 113.

134. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 92.

135. *Id.*

136. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 94.

137. FLANAGAN, *supra* note 11, at 111; MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 94.

138. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 92, 94.

139. FLANAGAN ET AL., *supra* note 11, at 118–19.

140. *Id.*

141. *Id.* (“Taken to the extreme, this could lead to 630 different First Nation land codes in Canada, each with uniquely defined property rights . . .”).

142. *Id.*

143. *Id.* at 109, 118–19. The average time needed in order to complete the process of implementing a land code under the FNLMA is 1,068 days. *Id.* at 109.

relieve their suffering.¹⁴⁴ Attendants included former Supreme Court Justice William Strong, author of the majority opinion in *Strauder v. West Virginia* prohibiting the exclusion of blacks from juries;¹⁴⁵ General Clinton B. Fisk, founder of the “Fisk University for the education of colored youth;”¹⁴⁶ and James E. Rhoades, president of the first college to grant doctoral degrees to women.¹⁴⁷ This committee—the Lake Mohonk Conference of Friends of the Indians (“Conference”)—had a monumental effect on the future of tribes in the United States through its intellectual progeny—the General Allotment Act of 1887 or, as it is commonly known, the Dawes Act (“Act”).¹⁴⁸

Albert K. Smiley—a member of the board of Indian Commissioners and one of the founders of the Conference—enunciated the primary goal of the Conference.¹⁴⁹ Unwittingly echoing the sentiments of the citizens of Babel who cried “[g]o to, let us build us a city and a tower,” Mr. Smiley stated, “[m]y aim has been to unite the best minds interested in Indian affairs, so that all should act together and be in harmony, and so that the prominent persons connected with Indian affairs should act as one body and create a public sentiment in favor of the Indians.”¹⁵⁰ For three days the members of the Conference, acting as a primitive think tank, met to air their grievances about the present state of Indian affairs, propose policy changes, and discuss their experiences as they attempted to rally political support for those proposed policies.¹⁵¹ Although over 130 years have passed since the first Conference convened, a review of the proceedings revealed that members of the Conference were concerned by many of the same indignities and wrongs cited by modern Native American (and First Nations) advocates.¹⁵²

During the Conference of 1885, C.C. Painter, a pastor and professor of theology at Fisk University, deftly explained the institutional barriers to progress.¹⁵³ Painter stated unequivocally that “the difficulties do not lie with [the Indians], but in Washington.”¹⁵⁴ The Federal government had broken the treaties it had created with the tribes.¹⁵⁵ It had not respected the rule of law in its dealings with Indians.¹⁵⁶ The interests of white men with money or connections in Washington had continuously and effectively frustrated any attempt at legislative reform.¹⁵⁷

144. LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIANS, PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIANS (1885) [hereinafter LAKE MOHONK]; FLANAGAN ET AL., *supra* note 11, at 43.

145. *Strauder v. West Virginia*, 100 U.S. 303 (1880); LAKE MOHONK, *supra* note 144, at 5.

146. LAKE MOHONK, *supra* note 144, at 1; *Obituary Clinton Bowen Fisk*, N.Y. TIMES, July 10, 1890, available at <http://query.nytimes.com/gst/abstract.html?res=940DEEDE133BE533A25753C1A9619C94619ED7CF>.

147. LAKE MOHONK, *supra* note 144, at 5; *James E. Rhoads, first president of Bryn Mawr College (1884-1894)*, BRYN MAWR COLLEGE, <http://www.brynmawr.edu/Library/exhibits/inauguration/rhoads.html>.

148. Dawes Act, *supra* note 63; see LAKE MOHONK, *supra* note 144, at 1, 27–28.

149. LAKE MOHONK, *supra* note 144, at 1.

150. *Genesis* 11:3–4 (“And they said one to another, Go to, let us make brick, and burn them thoroughly. And they had brick for stone, and slime had they for mortar. And they said, Go to, let us build us a city and a tower, whose top may reach unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth.”); LAKE MOHONK, *supra* note 144, at 1.

151. LAKE MOHONK, *supra* note 144, at 1; see also *id.* at 5–6, 11–14, 27–28.

152. These issues range from treaty rights and land rights to alcoholism and welfare. See *id.* at 14–16, 29–32.

153. *Id.* at 11–14.

154. *Id.* at 11.

155. *Id.*

156. *Id.*

157. *Id.* at 12.

If, perchance, a Congressman were to take an interest in a bill promoting reform, it would be next to impossible to get the bill passed—or even voted on—owing to the procedural rules then in place.¹⁵⁸ Even if the direct emissary of the federal government to the Indian tribes—the Indian Agent—were an honest man who sincerely wanted good for the Indians under his charge, he would have “[found] himself tied hand and foot” by regulations and politics.¹⁵⁹ Painter observed that the situation was such that “if [the Indian Agent] succeeds, it will be by a wonderful Providence.”¹⁶⁰ In Painter’s view, the prevailing federal policy left members of the Indian tribes with “no opportunity as a man, and no protection as a citizen.”¹⁶¹

Painter, in his exposition, decried the inefficiency, abuse, and error that were the results of the federal government’s continued refusal to apply the Whig principles of local government, rule of law, and private property rights to its dealings with the tribes.¹⁶² Yet, the direct application of those principles did not meet with universal approval amongst the members of the Conference.¹⁶³ Mr. Smiley’s response—that the current system was not optimal but it was the only viable option—was based on a series of assumptions grounded in the Tory ideal of justice and stability through strong central leadership.¹⁶⁴ As Dr. Rhoades explained, while the Conference would address “positive mistake[s]” made by the federal government, it was the intent of the Conference to “do all in its power to strengthen the hands of the President, the Secretary of the Interior, the Commissioner of Indian Affairs, and other officers engaged in Indian management” and “pass by what may sometimes seem to us unwise, and give them our hearty support.”¹⁶⁵

B. *The Dawes Act*

While the Conference failed to effectively address concerns about federal inefficiency and the absence of the rule of law in dealings with Indian tribes, the Conference generated one proposal for the redistribution of reserve land based on an increase in centralized government involvement in tribal affairs that permanently changed the course of Indian affairs.¹⁶⁶ Following the Conference of 1884, three members of the Conference took part in a committee that met with President Cleveland and discussed the future of federal Indian policy and administration, including “the importance of defending the rights of the Indians to their lands.”¹⁶⁷ According to the Conference, to achieve this objective the Indians must first “hold their lands in severalty.”¹⁶⁸ There must then be a twenty-five year buffer period during which time the tribe member could not alienate or encumber the

158. *Id.*

159. *Id.* at 11–12.

160. *Id.* at 11.

161. *Id.*

162. *Id.* at 11–14. *see* FLANAGAN ET AL., *supra* note 11, at 30.

163. LAKE MOHONK, *supra* note 144, at 16, 29, 36.

164. *Id.* at 16. Mr. Smiley asserted that appropriations and regulations needed to flow from Washington to the tribes. In order to achieve some semblance of efficiency in the process, the federal government needed to implement a large, if somewhat ponderous, structure of “regulations and rules, and a complicated system of bookkeeping” in order to manage those appropriations and regulations. *Id.*

165. *Id.* at 27.

166. *Id.* at 6.

167. *Id.* at 5–6.

168. *Id.* at 6.

land.¹⁶⁹ After each Indian claimed his own plot of land, “the rest of the reservations should be thrown open to public occupation,” and the United States could buy the land and then use the money for the benefit of the Indians.¹⁷⁰

These proposals made by the Conference to President Cleveland formed the basis of the General Allotment Act of 1887—a bill sponsored by Senator Henry L. Dawes who was a speaker at the 1885 Conference.¹⁷¹ The government gave the individual tribe members designated as heads of their households one tract—one hundred sixty acres—of reserve land.¹⁷² The federal government held these tracts “in trust for the sole use and benefit of the Indian to whom such allotment shall have been made” or to his heirs for twenty-five years.¹⁷³ If the individual attempted to convey or encumber the land before the end of the trust period, “such [a] conveyance or contract [would] be absolutely null and void.”¹⁷⁴

Under the original language of the Act, after the government granted all members of the tribes a tract of land, or “sooner if in the opinion of the President it shall be for the best interests of said tribe,” the Secretary of the Interior would negotiate with the tribes for the sale of all land not allotted to tribe members.¹⁷⁵ The government would then hold the proceeds of the sale in trust for the “sole use of the tribe or tribes Indians.”¹⁷⁶ The Conference advocated using the proceeds of the sale for the benefit of the tribes; however, they did not envision the beneficiaries directly controlling the expenditures presumably made for their benefit.¹⁷⁷ Instead, proceeds were “at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.”¹⁷⁸

The defining feature of the Act was the mandatory participation requirement.¹⁷⁹ The Business Committee of the Conference of 1885 resolved that before implementation of the new land policy, the government should undertake “[e]very reasonable effort to get the consent of the Indian, but if the consent of a tribe cannot be obtained,” the government should execute the new land policy without their consent.¹⁸⁰ Members of the conference were “utterly opposed to any arrangement which would allow the Indians to huddle together, if they want to . . . holding their lands forever to the exclusion of civilizing influences.”¹⁸¹ The Act not only adopted this attitude but went beyond it by declaring that it was the President’s prerogative to unilaterally survey and allot reserve land.¹⁸² Not only was no express consent on the part of the Indian tribes needed for allotment, but “if any one entitled to an allotment shall fail to make a selection [w]ithin four years” an agent

169. *Id.*

170. *Id.*

171. *Id.* at 34–45.

172. Dawes Act, *supra* note 63; FLANAGAN ET AL., *supra* note 11, at 44–45. The government also granted single persons and orphans under the age of eighteen years old a fraction of a tract of land. Dawes Act, 24 Stat. at 388.

173. Dawes Act, 24 Stat. at 388.

174. *Id.* at 389.

175. *Id.*

176. *Id.* at 390.

177. LAKE MOHONK, *supra* note 144, at 6.

178. Dawes Act, 24 Stat. at 390.

179. FLANAGAN ET AL., *supra* note 11, at 45.

180. LAKE MOHONK, *supra* note 144, at 28 (internal quotation mark omitted).

181. *Id.*

182. Dawes Act, 24 Stat. at 388.

“appointed for that purpose” would “make a selection for such Indian.”¹⁸³

Though devised by a committee of otherwise capable and arguably sympathetic social reformers, allotment—as implemented through the General Allotment Act of 1887 and an amendment to the Act passed in 1891—proved to be a disaster for the Indian tribes.¹⁸⁴ By 1933 the amount of land held by Indian tribes declined from over 136 million acres to less than 70 million.¹⁸⁵ The imposition of a period of time during which owners could not alienate their land necessitated the subdivision of the land, created a multitude of heirs who each held only a nominal fractional share of the allotted land.¹⁸⁶ The burden of reconciling all those shares prevented the effective utilization of the land, and the “checkerboard[]” of various types of land rights on reservations that faced potential developers also stunted future economic growth.¹⁸⁷

Even the original goal of the Conference in championing allocation—the civilization of the Indians—was not realized under the Act.¹⁸⁸ The expected substantial increase in Indian farming on discrete familial homesteads, which the Conference saw as a crucial step towards turning Indians into civilized agrarians, did not materialize.¹⁸⁹ By 1900, non-Indians leased almost half of the allotted tracts.¹⁹⁰ Increased compliance with the Act reversed the “substantial growth” of Indian farming that had sprung up based on customary land rights in the years before Congress passed the Act and in subsequent years before the government had widely allotted Indian land.¹⁹¹ Indians that had previously successfully farmed small lots to which they held customary title found it to their advantage not to increase their farming efforts, as was the intent of the Conference and the Act, but rather to lease the remaining land and derive an income as landlords since the government had granted them legal title to more land than they could use.¹⁹² The Act did not create a full realization of the goal of encouraging white settlement on the newly opened reserve land since the government retained nearly two-thirds of the surplus land.¹⁹³

183. *Id.*

184. *See generally id.*; An Act to Amend and Further Extend the Benefits of the Act Approved February Eighth, Eighteen Hundred and Eighty-Seven, 26 Stat. 794 (1891), available at http://digital.library.ok-state.edu/kappler/Vol1/HTML_files/SES0056.html. *See* FLANAGAN ET AL., *supra* note 11, at 42–49.

185. FLANAGAN ET AL., *supra* note 11, at 48–49.

186. *Id.* at 48.

187. *Id.* at 48–49.

188. LAKE MOHONK, *supra* note 144, at 48; *see* LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND THE LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 79–113 (1981). For example, after allocation Indians on the Santee and Sisseton reservations experienced “increased poverty and a sharp decline in the amount of farming done by Indians” as well as “a decrease in school attendance, an increase in drunkenness, and an overall decline in group cooperation.” CARLSON, *supra*, at 137.

189. CARLSON, *supra* note 188, at 133–62.

190. FLANAGAN ET AL., *supra* note 11, at 48.

191. *Id.* at 52.

192. *Id.*

193. *Id.* at 48–49.

V. MODERN DEVELOPMENTS IN FIRST NATIONS PROPERTY RIGHTS:
THE FIRST NATIONS PROPERTY OWNERSHIP INITIATIVE

A. *The Nisga'a Final Agreement*

For over one hundred years, the Nisga'a Nation fought for a treaty that would recognize and protect the rights they asserted to their lands.¹⁹⁴ The Canadian parliament passed the Nisga'a Final Agreement ("NFA") in 2000, and the terms of that agreement directly inspired the birth of the FNPO.¹⁹⁵ Under the NFA, the Canadian government granted the Nisga'a Nation the right to control its land free from federal interference and the right to extensive self-government.¹⁹⁶ In sharp contrast to previous attempts at reform, which focused mainly on changing the character of the law within the framework of the Indian Act, the NFA released the Nisga'a Nation from the Indian Act.¹⁹⁷ Instead of merely granting the Nisga'a more control over its designated reserve land, the government no longer legally considered Nisga'a land to be reserve land and granted fee simple title to the Nisga'a Nation.¹⁹⁸ The NFA also moved the reversionary rights in the land from the government to the band, except in limited situations.¹⁹⁹

From a historical perspective, the change in tone that accompanied the negotiation of the NFA was even more striking than the change in the land rights themselves.²⁰⁰ The government no longer adhered to the policy of strict paternalism and unilateral control imposed by a strong, central power which had previously defined governmental actions from the Royal Proclamation of 1763 to the laws which made it illegal for Indian bands to raise money to advance land claims during the first half of the twentieth century.²⁰¹ Instead, all parties recognized that "reconciliation between the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict."²⁰² Breaking with their traditional support of governmental policies which treated aboriginal people as "minors" and sought to order their affairs for them, the Courts recognized that "[w]here adequately resourced and professionally represented parties have sought to order their own affairs . . . the Court should strive to respect their handiwork."²⁰³

Empowered by the AFN to create a unique land policy and independently direct tribal affairs, the Nisga'a Nation went beyond tribally held fee simple title and instituted

194. *Fact Sheet: Nisga'a Treaty*, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (Sept. 15, 2010), <http://www.aadnc-aandc.gc.ca/eng/1100100016428/1100100016429>.

195. First Nations Tax Comm'n, *An Interview with C.T. (Manny) Jules about FNPO*, FIRST NATIONS PROPERTY OWNERSHIP INITIATIVE, <http://fnpo.ca/Interview.aspx> (last visited Feb. 18, 2014); *Fact Sheet: Nisga'a Treaty*, *supra* note 194.

196. Nisga'a Final Agreement Act, S.C. 2000, c. 7.

197. *Chief Mountain v. British Columbia (Attorney General)*, 2011 BCSC 1394 (Can.), para. 27. The Indian Act still applies to the Nisga'a in the area of determination of Indian status. *Id.*

198. *Id.*; Nisga'a Final Agreement Act, ch. 3, s. 3.

199. Nisga'a Final Agreement Act, ch. 3, s. 7.

200. *Chief Mountain*, 2011 BCSC 1394, para. 19–21. *See supra* Part III.A.

201. *See supra* Parts II.B & III.A; FLANAGAN ET AL., *supra* note 11, at 155.

202. *Chief Mountain*, 2011 BCSC 1394, para. 21.

203. MILLER ET AL., *supra* note 70, at 60; *Chief Mountain*, 2011 BCSC 1394, para. 3 (quoting *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (Can.)) (citation omitted) (emphasis omitted).

the Nisga'a Landholding Transition Act ("LTA") in 2009.²⁰⁴ Under the LTA, the Nisga'a Nation became the only First Nation to give individual members the opportunity to hold their land in fee simple, use the land as security for a loan, and transfer it to whomever they chose regardless of whether the individual was or was not Nisga'a.²⁰⁵ In late 2013, the Nisga'a land office announced that it had signed off on the first three property transfers to tribe members.²⁰⁶

B. Basic Framework of the FNPO

Like the Levellers imprisoned in Burford Chapel, the Nisga'a sought to "throw off the Norman yoke" and establish a land system based on the three pillars of the rule of law with an emphasis on strong personal property rights, local representative government, and personal autonomy.²⁰⁷ Following the path the Nisga'a pioneered during its historic pursuit of a treaty, the creators and supporters of the FNPO now seek to offer that same liberty to all First Nations.²⁰⁸

If passed, the FNPO would create the possibility of complete, private control of First Nations land by First Nations.²⁰⁹ Instead of merely changing the contours of the possession rights that the Indian Act granted to First Nations, the FNPO would "recognize the First Nation[s] as holding fee simple title to [their] former reserve land."²¹⁰ First Nations would also exercise reversionary rights, expropriation rights, regulatory jurisdiction, and the power of taxation over their lands.²¹¹ These powers would continue even if the First Nations chose to enact the second prong of the ownership plan—allowing band members to individually hold title to their land in fee simple and transfer it to non-members if they wish.²¹²

The FNPO envisions a land system that sheds the accoutrements of federal control and replaces them with local tribal control of tribal land.²¹³ Under the FNPO, the Crown would transfer the underlying title to First Nations bands, and either the bands or individual

204. Nisga'a Landholding Transition Act (2009), available at [http://www.nisgaalisims.ca/files/nlg/Nisga'a%20Landholding%20Transition%20Act%20\(October%202009\).pdf](http://www.nisgaalisims.ca/files/nlg/Nisga'a%20Landholding%20Transition%20Act%20(October%202009).pdf).

205. *Nisga'a Landholding Transition Act Passed*, NISGA'A LISIMS GOVERNMENT, <http://www.nisgaanation.ca/news/nisga-a-landholding-transition-act-passed> (last visited Feb. 20, 2014); *B.C.'s Nisga'a Becomes Only First Nation to Privatize Land*, CBC NEWS (Nov. 4, 2013), <http://www.cbc.ca/news/canada/british-columbia/b-c-s-nisga-a-becomes-only-first-nation-to-privatize-land-1.2355794>. See Andrew Findlay, *The Nisga'a's Private Struggle*, BC BUS. (Mar. 3, 2010), <http://www.bcbusiness.ca/real-estate/the-nisgaas-private-struggle>.

206. *B.C.'s Nisga'a Becomes Only First Nation to Privatize Land*, *supra* note 205.

207. Daniel Hannan, *We Have Submitted Ourselves to a New Norman Yoke*, THE TELEGRAPH (Nov. 30, 2009), <http://blogs.telegraph.co.uk/news/danielhannan/100018325/we-have-submitted-ourselves-to-a-new-norman-yoke/>.

In 1649 . . . [a] number of Roundhead soldiers, who believed that they had been fighting to reverse the catastrophe of 1066 – to "throw off the Norman Yoke", in their phrase – felt betrayed by the new settlement, and continued to demand an extension of the franchise. Cromwell had 300 of the radicals – who had become known as Levellers – interned in Burford church.

Id. See also HANNAN, *supra* note 23, at 147–48.

208. *Proposal*, *supra* note 18.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

members could hold fee simple title to the land.²¹⁴ The jurisdiction of local tribal governments would include areas similar to those exercised by the Nisga'a such as the "[u]se, management, planning, zoning, development and similar matters related to the regulation and administration" of tribal land.²¹⁵ A Torrens style land registry system would also replace the "difficult to access and . . . incomplete" Indian Lands Registry, which "[d]evelopers [currently] use . . . at their own risk."²¹⁶

Most significantly, the voluntary nature of the process distinguishes the FNPO from other examples of top-down legislation such as the Indian Act or the Dawes Act which failed to respect the autonomy of the bands.²¹⁷ Instead of automatically applying to all First Nations, the FNPO would grant First Nations the opportunity to opt into the legislation upon an "acceptable demonstration of community support."²¹⁸ Once a band opts into the FNPO, it would have the freedom to decide how it would apply the land title system.²¹⁹ While bands could allow all tribal land to be held by individuals in fee simple, they could also decide to exercise greater control over the land.²²⁰ The FNPO would also cultivate individual autonomy as the creators of the FNPO believe it will eventually "reduc[e] (or eliminate[e]) the involvement of the First Nation (and certainly of the federal government) in the details of private transactions."²²¹

C. Potential Effects of the FNPO

1. Enhanced Access to Capital

The FNPO would radically change the current land system by allowing First Nation bands or their members to hold full, fee simple title to Indian reserve lands.²²² Under both the Indian Act and the FNLMA, the rights a band or an individual band member could claim to land were limited to lease hold interests.²²³ Under the FNPO, bands and individuals could claim the same ownership rights over reserve lands that all Canadians can claim in regard to off reserve lands: full, fee simple ownership with the ability to lease, sell, or mortgage the land without the approval of the Canadian government.²²⁴

Allowing individuals to hold land in fee simple will permit the investment of money

214. FLANAGAN ET AL., *supra* note 11, at 177; *Proposal*, *supra* note 18.

215. Nisga'a Lisims Government, *About, Nisga'a Nation*, <http://www.nisgaanation.ca/about-2> (last visited Feb. 20, 2014).

216. *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195; *Proposal*, *supra* note 18.

217. FLANAGAN ET AL., *supra* note 11, at 170.

218. *Id.*

219. *Id.*

220. *Id.* For example, bands could limit the areas where the new system would apply or "limit tenure to leasehold title." *Id.*

221. *Proposal*, *supra* note 18.

222. First Nations Tax Comm'n, *FAQs: Questions about the First Nations Property Ownership Initiative*, FIRST NATIONS PROPERTY OWNERSHIP INITIATIVE, <http://fnpo.ca/FAQs.aspx> (last visited Feb. 20, 2014).

223. *Id.*

224. *How Government Perpetuates Native American's Cycle of Poverty*, STOSSEL IN THE CLASSROOM (original air date Nov. 29, 2010), http://stosselintheclassroom.org/videos/how_government_perpetuates_native_americans_cycle_of_poverty; *Proposal*, *supra* note 18.

in homes and property without the fear of losing the investment.²²⁵ Under the current system, “buying a home on Indian reserve is the worst investment in Canada.”²²⁶ In an interview, Michael Lebourdais—Chief of the Whispering Pines Clinton Indian Band and former banker—recounted how he begged his sister who wanted to move nearer to their father not to buy a house on reserve land because without holding the underlying title her “house [was] going to be worth zero the day the mortgage [was] paid.”²²⁷ If home ownership on reserve land were increased both would have economic benefits and would further the goal of preserving bands as stable social units.²²⁸

At present only one tribe, the Nisga’a, allows individual band members to hold land in fee simple.²²⁹ At the end of 2013, the first three land transfers from the band to individual band members were finalized.²³⁰ As a result, individual members saw an immediate increase in the value of their homes.²³¹ Bert Mercer—the economic development officer for the Nisga’a government—estimates that his home’s value increased by \$30,000 because of the transfer.²³²

More importantly for entrepreneurs, that value is now available for the individuals to borrow against since the owner can mortgage the property and the bank can seize the property in the event of a default.²³³ Members of the Nisga’a Nation who need capital to finance personal business ventures now have the option of using their own land as collateral for a loan instead of asking for funds from a tribal government that can “often [be] painfully inert and cautious, extremely bureaucratic and not exactly a dynamo of entrepreneurialism.”²³⁴ Similarly, the FNPO will allow individual entrepreneurs to privately finance the business ventures that will form the basis of a successful economy on Indian lands.²³⁵

2. Reduced Transaction Costs

According to Coase theorem:

If all participants in the economy could be brought together, if initial ownership rights to all economically valuable entities were assigned among the participants, and if they could costlessly make fully specified and fully binding agreements, then the outcome should be an efficient economic plan, leaving only the division of spoils to be determined by

225. FLANAGAN ET AL., *supra* note 11, at 127–28.

226. *Natives Fight for Property Rights and Prosperity*, SUN NEWS (Dec. 31, 2013), <http://www.sunnewsnetwork.ca/video/2995931896001>.

227. *Id.* With such a steep penalty in place, many young professionals from First Nations have simply refused to buy homes on reserve land. *Id.*

228. MINISTRY OF INDIAN AFFAIRS, *supra* note 124, at 92, 94.

229. *B.C.’s Nisga’a Becomes Only First Nation to Privatize Land*, *supra* note 204.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*; *The Nisga’a’s Private Struggle*, *supra* note 204.

234. *The Nisga’a’s Private Struggle*, *supra* note 204.

235. Richard Wright, *The Nisga’a Experiment*, PROP. & ENVTL. RESEARCH CTR. (Dec. 4, 2013), <http://perc.org/articles/nisga-experiment>.

the bargaining strengths of the participants.²³⁶

Unfortunately, one thing stands in the way of this economic utopia: transaction costs.²³⁷ Transaction costs are the costs a party incurs pursuant to trying to gain information about a potential customer or supplier (search and information costs), negotiating and drawing up an agreement (bargaining and decision costs), and making sure the other party is abiding by the terms of the agreement after it is made (policing and enforcement costs).²³⁸

Today, because of the “imposed system of First Nations governance,” transaction costs are much higher on reserve than off reserve.²³⁹ A study by the First Nations Tax Commission found that “[i]t can cost four to six times as much to put together a major investment project on reserve.”²⁴⁰ The development time frame for a project on a reservation can be double, triple, or quadruple the time frame for the same project off reservation.²⁴¹ That differential is driving commerce away from what might otherwise be optimal locations for business.²⁴²

The most dramatic way in which the FNPO proposes to reduce transaction costs is through replacing the current deed system—the Indians Land Registry—with a Torrens-style title system.²⁴³ Under a deed system, the registrar acts as a mere filing system for documents relating to a piece of property.²⁴⁴ The Indian Lands Registry is “poorly managed,” “incomplete,” “difficult to access,” and “almost completely ineffective.”²⁴⁵ Since the parties and not the registrar bear the risk of an invalid title under a deed system, an incomplete and poorly managed registry adds a great deal of risk into any business transaction on reserve land.²⁴⁶

In contrast to a deed system where “an abstract is evidence of title,” under a Torrens-style land system “the Certificate of Title is the title.”²⁴⁷ The registrar is responsible for the validity of the title, and subsequent transactions only require the parties to examine the Certificate of Title to determine both current ownership and outstanding claims.²⁴⁸ This significantly reduces transaction costs in terms of both the money and time required to

236. AVINASH K. DIXIT, *THE MAKING OF ECONOMIC POLICY: A TRANSACTION COST POLITICS PERSPECTIVE* 37 (1998).

237. *Id.* at 37–38. Transaction costs are “costs other than the money price that are incurred in trading goods or services” such as “time, energy[,] and money.” Paul M. Johnson, *Transaction Costs*, A GLOSSARY OF POLITICAL ECONOMY TERMS, http://www.auburn.edu/~johnspm/gloss/transaction_costs (last visited Feb. 20, 2014).

238. Thayer Watkins, *The Transaction Cost Approach to the Theory of the Firm*, SAN JOSE UNIV. ECON. DEP’T, <http://www.sjsu.edu/faculty/watkins/coase.htm> (last visited Feb. 20, 2014).

239. FIRST NATIONS TAX COMM’N, *EXPANDING COMMERCIAL ACTIVITY ON FIRST NATION LANDS*, available at http://www.fiscalrealities.com/uploads/1/0/7/1/10716604/expanding_commercial_activity.pdf.

240. *Id.* at 1.

241. *Id.* at 2.

242. FLANAGAN ET AL., *supra* note 11, at 135–36.

243. *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195.

244. *Id.*

245. FLANAGAN ET AL., *supra* note 11, at 164; *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195.

246. FLANAGAN ET AL., *supra* note 11, at 164; *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195.

247. Shaun Watchie Perry, *Outline of the Torrens Act*, AMERICAN BAR ASSOCIATION (Aug. 2005), https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/torrenact.html (emphasis omitted).

248. FLANAGAN ET AL., *supra* note 11, at 164; Perry, *supra* note 247.

facilitate the transfer of the title since “the amount of time [it takes] for a lawyer or other professional to review the current guaranteed title is minimal.”²⁴⁹ Having a guaranteed Certificate of Title also significantly reduces the risk to the buyer or investor who would otherwise be required, under a deed system, to establish title by piecing together documents housed in the incomplete Indian Lands Registry.²⁵⁰ The Nisga’a also recognizes the Torrens system as the “most culturally appropriate system” of land registration because it is the “public recording of interest”—similar in substance to the past practice of recognizing rights before a public gathering—that establishes title.”²⁵¹

3. Greater Equality within a Culturally Responsive Framework

Unlike Canada’s Indian Act or the Dawes Act in the United States, First Nations leaders created the FNPO to accomplish longstanding First Nations goals.²⁵² In 1910, the Chiefs of the Shuswap, Okanagan and Couteau bands issued a statement, now known as the Shuswap Memorial, to the Canadian premier that recounted how their bands had received the English settlers with “good faith, friendliness and patience.”²⁵³ In return, the Canadian government treated them as “subjects without any agreement to that effect and force[d] their laws on us without our consent, and irrespective of whether they [were] good for us or not.”²⁵⁴ Instead of living in harmony as trading partners or “guests” on Indian land, the Canadian government had appropriated the Indians’ lands and property and the bands declared that they had, in the end, found themselves “without any real home in this [their] own country.”²⁵⁵

Critics of increased property rights amongst First Nations often claim that bands who seek to strengthen property rights are ‘*embracing their own assimilation*.’²⁵⁶ Yet the FNPO does not ask First Nations to adopt measures which would dilute their cultural identity such as abandoning their legal status as Indians, their cultural and societal ties, or their jurisdiction over tribal land.²⁵⁷ First Nations never unilaterally or uniformly rejected trade and property rights, but instead the Canadian government “legislated [First Nations] out of the economy.”²⁵⁸ The FNPO now offers Canada the opportunity to redress those past wrongs and offers bands the opportunity to settle the land question on their own terms.²⁵⁹

The FNPO does not attempt to bring about what economist Thomas Sowell termed “cosmic justice,” which entails creating absolute equality of both prospects and outcomes.²⁶⁰ Instead, the FNPO facilitates individual liberty in the area of land right through

249. FLANAGAN ET AL., *supra* note 11, at 164.

250. *Id.* at 163–64.

251. *Id.* at 164.

252. See *Memorial to Sir Wilfred Laurier, 1910*, WILLIAMS LAKE BAND, <http://williamslakeband.ca/History/MemorialtoSirWilfredLaurier1910.aspx> (last visited Feb. 20, 2014).

253. *Id.*

254. *Id.*

255. *Id.*

256. *The Nisga’a’s Private Struggle*, *supra* note 205.

257. *Proposal*, *supra* note 18.

258. *How Government Perpetuates Native American’s Cycle of Poverty*, *supra* note 224.

259. *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195. Participation in the FNPO is completely voluntary, and those bands whose members do not feel that increased property rights are compatible with their tribal culture are free to continue under the current land management scheme. *Proposal*, *supra* note 18.

260. Thomas Sowell, *The Quest for Cosmic Justice*, THOMAS SOWELL, <http://www.tsowell.com/spquestc.html>

moving toward “the application of the same rules and standards to all.”²⁶¹ In an article in support of the FNPO, Shane Gottfriedson—Chief of the Tk'emlups te Secwepemc and Chair of the Shuswap Nation Tribal Council—confronted the inequity of not extending land rights to include Indian land.²⁶² He stated, “[i]n 2013 in Canada, only the mentally incompetent, children, and First Nation people on reserve are not allowed to own land. Property ownership is a basic human right.”²⁶³

VI. MODERN PROPERTY RIGHTS AMONGST NATIVE AMERICAN INDIAN TRIBES

A. *Modern Structure of Property Rights on American Indian Reservations*

In 1934, the Indian Reorganization Act (“IRA”) formally ended the era of allotment.²⁶⁴ When the dust settled, what the Dawes Act and other subsequent legislative and judicial actions created was a ‘checkerboard[]’ of various types of land rights.²⁶⁵ Four distinct categories of property emerged: “individual fee simple (private[] land owned by individuals), individual trust (held in federal trust for individuals), tribal trust (held in federal trust for the tribe), and fee simple tribal land (owned by the tribe, but not in federal trust).”²⁶⁶

A title holder’s ability to leverage a piece of reserve land to gain access to capital is generally determined by whether the owner holds the land in individual fee simple or whether the government holds the land in trust.²⁶⁷ Federal regulations subject trust land to a variety of provisos that increase transaction costs and inefficiency.²⁶⁸ Various jurisdictional and regulatory issues also decrease the value of the land, and the fractionalization of ownership amongst the heirs to the trust land continues.²⁶⁹

Beyond merely reducing the landholder’s access to capital, the communal management of land by both tribal governments and the Bureau of Indian Affairs (“BIA”) leads to the inefficient exploitation of natural resources on reserve land.²⁷⁰ The value of natural resources on reserve land in the United States is estimated at \$1.5 trillion.²⁷¹ Though there are vast coal, uranium, and oil and gas reserves on Indian land, parties cannot extract these resources without the oversight of various governmental agencies, including the BIA.²⁷²

(last visited Feb. 20, 2014).

261. *Id.*

262. Shane Gottfriedson, *Escaping the Indian Act: Who Should Own the Land?*, PROPERTY AND ENVIRONMENTAL RESEARCH CENTER (Dec. 4, 2013), <http://perc.org/articles/escaping-canadas-indian-act-who-should-own-our-lands>.

263. *Id.*

264. FLANAGAN ET AL., *supra* note 11, at 50–51.

265. *Id.* at 49; Carlos L. Rodriguez et al., *American Indian Collectivism*, PROPERTY AND ENVIRONMENTAL RESEARCH CENTER (2006), <http://perc.org/articles/american-indian-collectivism>.

266. Rodriguez, *supra* note 265.

267. Koppisch, *supra* note 10.

268. Rodriguez, *supra* note 265. For instance, an owner of individual trust land cannot transfer the title, which prevents the owner from using the land as collateral. Instead, the collateral for a mortgage is the “income derived from the asset, rather than the asset itself.” *Id.*

269. *Id.*

270. Terry Anderson & Shawn Regan, *Unlocking the Wealth of Indian Nations*, PROP. & ENVTL RESEARCH CTR. (Sept. 27, 2013), <http://perc.org/articles/unlocking-wealth-indian-nations>.

271. *Id.*

272. *Id.*

This centralized control creates “layers of bureaucratic red tape” which add significant transaction costs to any attempt at development.²⁷³ Additionally, as with any large bureaucracy, the incentives of the agency lie in “budget maximization rather than efficient resource use.”²⁷⁴ The centrally planned economic growth measures often ignore the “milieu of political, cultural, ideological, and ownership constraints” of the tribes.²⁷⁵ Because of these and other factors, parties exploit resources on reserve at a rate lower than resources off reserve, and the benefit to the tribe is often a pittance.²⁷⁶

Communally held reserve land, which forms the majority of reserve land, has fallen victim to the “tragedy of the commons.”²⁷⁷ The tragedy of the commons is traditionally explained by referencing the example of a public green where all parties are free to graze their herds.²⁷⁸ If the green is overgrazed it will be destroyed and will be worthless to all parties who currently use it.²⁷⁹ Unfortunately, none of the individual parties have any incentive to reduce their consumption of the resource because whatever one party preserves by reducing consumption now will not be available later, but it will merely be consumed by another party.²⁸⁰ “Therein is the tragedy,” wrote Garrett Hardin, “[e]ach man is locked into a system that compels him to increase his herd without limit[—]in a world that is limited. . . . Freedom in a commons brings ruin to all.”²⁸¹ As Hardin recognized, the solution to this crisis is vigorous private property rights.²⁸²

B. *The Next Step for Native American Tribes?*

In 2012, Congress took a small step toward greater local tribal control of reserve land through passing the Helping Expedite and Advance Responsible Tribal Homeownership (“HEARTH”) Act.²⁸³ The HEARTH Act gave tribal governments the authority to grant twenty-five-year business leases without federal approval.²⁸⁴ In passing the

273. *Id.* For example, the regulatory structure on the Fort Berthold reservation required a forty-nine-step approval process to drill on reserve land instead of the four-step approval process needed to drill in the same area but off reserve land. *Unlocking the Wealth of Indian Nations*, JOHN BATCHELOR SHOW (Oct. 10, 2013), available at <http://perc.org/articles/unlocking-wealth-indian-nations-0>.

274. Terry Anderson, *The Property Rights Paradigm: An Introduction*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 1, 2 (Terry Anderson ed., 1992).

275. *Id.*

276. Anderson & Regan, *supra* note 270. For example, a study of private land and adjacent trust land used for agriculture showed the private land to be “30-90% more productive” in spite of there being little difference in the raw quality of the land. Instead, the author explains that it was “the amount of investment in the land that [was] different.” Koppisch, *supra* note 10.

277. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243 (1968). For a brief introduction to the principle of the tragedy of the commons see LearnLiberty, *Tragedy of the Commons* (uploaded 2011), available at <https://www.youtube.com/watch?v=MLirNeu-A8I>.

278. Hardin, *supra* note 277, at 1244.

279. *Id.*

280. *Id.*

281. *Id.* The communal nature of much of the reserve land in the United States has also contributed to the substandard housing and lack of investment which has defined much of the reserve land in the United States. Koppisch, *supra* note 10.

282. Hardin, *supra* note 277, at 1245 (“The tragedy of the commons as a food basket is averted by private property, or something formally like it.”).

283. Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, WHITEHOUSE.GOV (July 30, 2012, 1:54 PM EDT), <http://www.whitehouse.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act>.

284. Helping Expedite and Advance Responsible Tribal Homeownership Act, Pub. L. No. 112–151, § 2, 126 Stat. 1150, 1151 (2012).

HEARTH Act, Congress and the Obama administration purported to recognize that tribes are capable of greater self-government and the subsequent reduction in transaction costs would be a net positive.²⁸⁵

Though the Obama administration touted the passage of the HEARTH Act as a step forward on the road from poverty to prosperity, the HEARTH Act did not address the heart of the problem.²⁸⁶ As the First Nations who support the FNPO discovered, it is not practical for developers to invest in major projects based on short term leases.²⁸⁷ Even on a smaller scale, potential small business people cannot afford to invest the extra time, money, and energy needed to obtain a lease on trust land.²⁸⁸ An FNPO style approach to land holdings—moving away from the trust system and granting individual tribe members ultimate title to their land—would remove these barriers to economic progress.²⁸⁹ As long as the holders of Indian lands are mere “ward[s]” of the federal government without strong property rights or the ability to act autonomously, reserve lands will continue to operate as what economist Hernando de Soto termed “dead capital.”²⁹⁰

If prosperity is going to take root amongst Native Americans currently living on reservation land, the tribes and individuals must decouple from the BIA.²⁹¹ It is an inconvenient fact that “any effort at land reform must go through the [BIA].”²⁹² Unfortunately, the BIA is unlikely to voluntarily sign its own death certificate by devolving power, first, to local tribes and then to individual tribe members.²⁹³ When attempting to explain the reticence of bureaucrats to take common sense measures to remedy an over-expansive state, Member of the European Parliament Daniel Hannan has often quoted Upton Sinclair who said, “[i]t is remarkably difficult to make a man understand something when his salary depends upon his not understanding it.”²⁹⁴ In the end, the only tenable solution will be for tribes to decouple from the BIA.²⁹⁵

Though the devolution of power from Washington to local tribal governments and the partial restoration of local sovereignty is a net positive, if legislation merely replaces the current trust relationship with the federal government with tribal control, Indian land will remain dead capital.²⁹⁶ A study by economist Terry Anderson revealed that while in-

285. *Id.*

286. *Id.*

287. *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195.

288. Randy Simmons, *Impressions*, PROPERTY AND ENVIRONMENTAL RESEARCH CENTER (Dec. 4, 2013), <http://perc.org/articles/impressions-4>.

289. *An Interview with C.T. (Manny) Jules about FNPO*, *supra* note 195; *Impressions*, *supra* note 288.

290. *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 2 (1831); DE SOTO, *supra* note 10, at 6.

291. *Unlocking the Wealth of Indian Nations*, *supra* note 270.

292. Koppisch, *supra* note 10.

293. *Id.*

294. DanielHannanMEP, Daniel Hannan on Cavuto: Europeanization of America (uploaded Feb. 17, 2012), available at <https://www.youtube.com/watch?v=kZHd-tA2pxs>. During his tenure as a member of the European Parliament, Daniel Hannan witnessed a bureaucracy that took on a life of its own and like a cancerous tumor began funneling precious resources away from the body politic to assure its own growth and survival. See DANIEL HANNAN, *THE NEW ROAD TO SERFDOM: A LETTER OF WARNING TO AMERICA* (2011).

295. David Haddock, *An Untrustworthy Trustee*, PROP. & ENVTL. RESEARCH CTR. (2012), <http://perc.org/articles/untrustworthy-trustee>.

296. Terry Anderson, *At Last, Some Bright Spots in Indian Country*, PROP. & ENVTL. RESEARCH CTR. (2012), <http://perc.org/articles/last-some-bright-spots-indian-country>.

dividual trust land was thirty-five percent less productive than similar land which was privately held, tribal lands were eighty-five percent less productive than privately owned reserve lands.²⁹⁷ Any entrepreneur seeking to start a business on tribal land is faced with the prospect of navigating a “quagmire” of regulations, assessments, leases, and committees.²⁹⁸ Instead, it is the development on pockets of private land that facilitates what economic growth there is currently on reservations.²⁹⁹ If prosperity is going to emerge amongst the Native American population living on reserve land, there must be a movement, like that seen amongst the Nisga’a and the First Nations proponents of the FNPO, towards either private ownership of reserve land or something which is its substantive equivalent.³⁰⁰

VII. CONCLUSION

At the end of *Great Expectation*, after the terrible repercussions of the seemingly benevolent actions of Pip’s unsolicited “benefactors” manifested, Pip dreamed:

that I was a brick in the house-wall, and yet entreating to be released from the giddy place where the builders had set me; that I was a steel beam of a vast engine, clashing and whirling over a gulf, and yet that I implored in my own person to have the engine stopped, and my part in it hammered off.³⁰¹

So too are First Nations and Native American leaders seeing with clarity what many of their ancestors saw: that “[i]t is [the] government which is to blame by heaping injustice on us.”³⁰² In spite of the risks cited by critics such as further loss of tribal land or tribal culture, First Nations leaders are demanding that their part in the federal bureaucracy be “hammered off” and they be cut free from the Indian Act and trust system.³⁰³ Native American entrepreneurs and advocates are also “entreating to be released” from the centrally planned society that purported to “civilize” them but in effect makes it “nearly impossible to do business on the reservation.”³⁰⁴

Lack of workable property rights provides a convincing—if only partial—answer to the question, “Why are Indian reservation so poor?”³⁰⁵ Based on this, the next question most would ask is, “What is the solution?”³⁰⁶ Yet, if society can glean any wisdom from

297. *At Last, Some Bright Spots in Indian Country*, *supra* note 296.

298. *Impressions*, *supra* note 288.

299. *Id.*

300. Koppisch, *supra* note 10 (“Anderson puts the choice for tribes in sharp terms. ‘If you don’t want private ownership, and want to stay under trusteeship, then I say, “fine.” But you’re going to stay underdeveloped; you’re not going to get rich.’”). *See supra* Part V.

301. CHARLES DICKENS, *GREAT EXPECTATIONS* 462 (Charlotte Mitchell ed., Penguin Classics 1996) (1860-61).

302. *Memorial to Sir Wilfred Laurier*, *supra* note 252.

303. DICKENS, *supra* note 301, at 462.

304. *Id.*; Alys Landry, *Native History: Dawes Act Signed Into Law to ‘Civilize’ Indians*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/08/native-history-dawes-act-signed-law-civilize-indians-153467>; *Children of the Plains*, *supra* note 36.

305. Koppisch, *supra* note 10.

306. *See generally id.*

the experiences of Native Americans under such benevolent dictators as the creators of the Dawes Act, it is to beware lest society is tempted to adopt the seemingly affable and visionary policies of, in C.S. Lewis' words, "omnipotent moral busybodies" who, in the end, "will torment [their wards] without end for they do so with the approval of their own conscience."³⁰⁷ Those who advocate legislative reform in the area of American Indian law should approach their task with the solemn understanding that, whatever the final course of action, "there are no solutions; there are only tradeoffs."³⁰⁸

Policymakers and advocates should adopt an approach that is "modest, and practical, and pragmatic, and not visionary."³⁰⁹ Any policy decision should not focus on instituting a "grand plan" to remake the institutions that advocates perceive to be the source of the problem.³¹⁰ Instead, proposals should focus on removing impediments to the realization of the three proven principles of personal autonomy, local representative government, and the rule of law.³¹¹ These principles must provide the foundation for all policy, and once the "structure[] [is] right then liberty and happiness will follow."³¹²

Aboriginal leaders today must win the right to the one asset that the governments in North America have consistently denied them: "the freedom to choose."³¹³ In spite of a century of good intentions, Native American entrepreneurs still labor under a system in which they are "more regulated than a nuclear power plant."³¹⁴ Instead of subjecting the tribes to another century of social experiments, those responsible for formulating policies with regard to Indian affairs should seek only to nourish personal autonomy, local sovereignty, and the rule of law.³¹⁵

The FNPO should be enacted into law in Canada, and the United States should implement similar legislation.³¹⁶ The FNPO would cause a devolution in power from the federal government of Canada to individual bands and then to the individual band members.³¹⁷ It would reduce the transaction costs associated with developing reserve land and open up opportunities for First Nations entrepreneurs.³¹⁸ A regime similar to the FNPO that transformed trust land on American reservation into the substantive equivalent of private property would reduce economic inefficiency and release the entrepreneurial spirit of Native Americans.³¹⁹

307. C.S. Lewis, *The Humanitarian Theory of Punishment*, 13 *AMCAP J.* 147, 151 (1987).

308. Levan Ramishvili, Thomas Sowell: There Are No Solutions, Only Trade-offs (uploaded 2013), *available at* https://www.youtube.com/watch?v=3_EtIWmja-4.

309. The Heritage Foundation, *Inventing Freedom: How the English-Speaking People Made the Modern World* (uploaded 2013), *available at* <https://www.youtube.com/watch?v=uep7GA9hCKM> [hereinafter *Inventing Freedom*].

310. FatHeadMovie, *Diet, Health, and the Wisdom of Crowds* (uploaded Dec. 17, 2013), *available at* <https://www.youtube.com/watch?v=KzPnnDDCIjo>. See THOMAS SOWELL, *THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR PUBLIC POLICY* (1995). For a humorous overview of 'The Vision of the Anointed' versus 'The Wisdom of Crowds' and its effect on diet and nutrition policy in the United States by movie-maker Tom Naughton, see generally *Diet, Health, and the Wisdom of Crowds*, *supra*.

311. See *supra* Part II.

312. *Inventing Freedom*, *supra* note 309.

313. JULES, *supra* note 36, at xii.

314. *Children of the Plains*, *supra* note 36.

315. See generally SOWELL, *supra* note 310; see also *supra* Part II.

316. See *supra* Parts V.B & VI.B.

317. *Proposal*, *supra* note 18.

318. *Id.*

319. See generally DE SOTO, *supra* note 10; see generally Koppisch, *supra* note 10.

The Apostle Paul explained, “as long as the heir is a child, he does not differ at all from a slave although he is owner of everything, but he is under guardians and managers until the date set by the father.”³²⁰ The “guardians and managers” have brought First Nations and Native American tribes to the brink of complete desolation through generations upon generations of social engineering.³²¹ It is time for the federal government to release them from their status as slaves and restore them to their positions as autonomous human being and the rightful owners of their land.³²²

—Alexandria Mayfield*

320. *Galatians* 4:1-2 (NASB).

321. *Id.* at 4:2.

322. *Id.* at 4:1; *see generally* Koppisch, *supra* note 10.

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